In The
Supreme Court of the United States
October Term 1995

GLEN HEISER and GEORGE SPENCER,

Petitioners,

vs.

KEEN A. UMBEHR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should the remedies articulated by this Court in *Pickering v. Board of Education of Township High School District*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) and its progeny be extended and amplified to protect the economic rights of government contractors whose services are terminable at will?

2. How are the tests of *Pickering* and its progeny to be reformulated or redescribed to fit the circumstances of an independent contractor, if the rule of *Pickering* is to be extended?

3. If independent contractors are to be given the same protections as employees under *Pickering*, will the affirmative defenses available to employers remain available to the contracting agency?

LIST OF PARTIES

The parties to the proceedings are:

Petitioners:

GLEN HEISER and GEORGE SPENCER, in their official capacities as members of the Board of County Commissioners of Wabaunsee County, Kansas.

Respondents:

KEEN A. UMBEHR.

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The decision of the U.S. District Court for the District of Kansas granting summary judgment to petitioners is reported as *Umbehr v. McClure, et al.*, 840 F.Supp. 837 (D.Kan. 1993). The decision of the Tenth Circuit Court of Appeals, reversing the grant of summary judgment to petitioners in part and remanding the case for further proceedings against petitioners in their official capacities is published as *Umbehr v. McClure, et al.*, 44 F.3d 876 (10th Cir. 1995). Parallel proceedings in state court between the same parties have resulted in two published decisions: see *Umbehr v. Board of Wabaunsee County Commissioners*, 825 P.2d 1160, 16 Kan.App.2d 512 (1992) and *Umbehr v. Board of Wabaunsee County Commissioners*, 843 P.2d 176, 252 Kan. 30 (1992).

STATEMENT OF JURISDICTION

Original jurisdiction in the U.S. District Court for the District of Kansas was based upon 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 1983. Respondent prosecuted a timely appeal to the Tenth Circuit Court of Appeals under the authority of 28 U.S.C. § 1291. This Court has jurisdiction to review the decision of the Tenth Circuit Court of Appeals under 28 U.S.C. § 1254(1).

The judgment of the Tenth Circuit Court of Appeals was entered on January 4, 1995. A petition for rehearing was denied on February 10, 1995.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment 1:

FREEDOM OF RELIGION, SPEECH AND PRESS

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This case squarely confronts the Court with the need to determine the scope of the rights and duties of persons who provide public services through contract or franchise arrangements with local government, rather than serving directly as governmental employees. This Court has not previously decided whether the free speech protections afforded to governmental employees will be extended to persons who provide services to the public less directly, as non-employee contractors or franchisees.

The Tenth Circuit Court of Appeals has decided that the rights of employees should be extended to those who provide public services as non-employees, no matter how tenuous the contractual relationship with the government may be and without regard to the unqualified contractual right of the government to terminate the relationship at will. The Tenth Circuit Court of Appeals has

imposed on local units of government the obligation to avoid economic injury to government contractors whose statements on issues of public concern may have irritated public administrators. Because the decision of the Tenth Circuit Court of Appeals is clearly in conflict with a number of decisions on the same issue rendered by other Circuit Courts of Appeal, and because this Court has never addressed this matter of increasing public importance, review is necessary.

In this lawsuit a failed candidate for public office seeks the assistance of the Federal Courts in taking control of those aspects of local government from which he has derived a personal profit. Mr. Umbehr claims that the First Amendment guarantees him the continuing right to operate a municipal trash hauling service as a government sanctioned monopoly, just because he publicly challenged the integrity of the Board during his

election campaign. He does not claim and did not have any legal right to a continuation of his monopoly, absent some event which would permit invocation of the First Amendment. By wrapping himself in the protection of the First Amendment, Umbehr seeks to have the Court grant him greater economic rights than he could have seized as spoils had he won the election.

PROCEDURAL BACKGROUND

The parties have been in litigation with one another since 1990 in disputes arising from the contract for the collection of private refuse in six small towns in a sparsely populated county in east central Kansas. Plaintiff Keen Umbehr operated the municipal trash collection service for residents of the six towns under a contract negotiated through the Board of County Commissioners. Although no county refuse was collected under the contract, the county was a party to the agreement because its landfill

was the expected ultimate resting place for the trash.

Under the contract those towns which elected to participate would pay fees to Umbehr, and Umbehr would pay landfill charges for using the county dump. Each town agreed not to do business with any competing trash hauler. The contract was renewable annually, with an option for any party to terminate with 60 days' prior notice. The contract gave Umbehr the right but not the duty to dispose of the collected refuse at the landfill owned by the county, in return for his agreement to pay landfill charges under a schedule fixed by the county. The contract provided for termination for cause and included as cause the nonpayment of fees for depositing refuse at the county landfill.

In early 1989 the Wabaunsee County Commission began discussing the need to raise landfill rates. Umbehr appeared at County Commission meetings and spoke against a

general increase of user fees, which would have increased his own operating costs. Umbehr stated that he preferred increased fees to be paid out of other existing funds or through tax increases instead. Umbehr was sufficiently concerned about this and other issues that he declared himself a candidate for an upcoming vacancy on the three-member Board of County Commissioners. (Umbehr contested the bid of Commissioner McClure for re-election.)

During the course of his campaign Umbehr made public comments, both in and out of print, criticizing the individual members of the Board of County Commissioners. As a result of some of his criticisms the official conduct of the members of the Board was investigated by the Kansas Attorney General. On December 29, 1989 the Attorney General reported the result of his investigation, which included an express finding that no

member of the Board of County Commissioners had engaged in any misconduct.

In February, 1990 the Board voted 2-1 to terminate Mr. Umbehr's trash collection contract. Commissioner McClure voted against termination. Because notice of termination was not given properly , Umbehr's contract renewed automatically for another year.

In April, 1990 the Board voted to raise the rates for all landfill users, including Umbehr, effective June 1. Umbehr refused to pay the increased rates and filed a civil action in the District Court of Wabaunsee County, Kansas on June 1, 1990 seeking an injunction against the rate hike. This lawsuit was unsuccessful, and ultimately resulted in published decisions on appeal in the Kansas courts. See *Umbehr v. Board of Wabaunsee County Commissioners*, 825 P.2d 1160, 16 Kan.App.2d 512 (1992) and *Umbehr v. Board of Wabaunsee County Commissioners*, 843 P.2d 176, 252 Kan. 30 (1992). The Kansas

Supreme Court held that Umbehr had no right to appeal from the decision to raise the landfill rates absent proof of a violation of his constitutional rights or other similar oppressive conduct.

Both Umbehr and McClure failed in their 1990 election bids, losing to a third candidate, Steven Anderson. Umbehr's public criticisms of the Board members ceased after the election.

The question of terminating the municipal trash hauling contract was again debated in January, 1991. Commissioners Spencer and Heiser voted to terminate, and Commissioner Anderson voted nay. At the time the vote was taken Umbehr had been in default in the payment of landfill charges for over six months. His default was not stated to be a motivating factor in the votes of the Board members, however. Umbehr promptly negotiated exclusive contracts with five of the six

participating towns, with higher rates payable to him.

Throughout the state court appeal Umbehr had refused to pay the increased fees mandated in the spring of 1990. On July 25, 1991, an order of the District Court of Wabaunsee County prohibited Umbehr from continuing to use the landfill until the delinquent payments were made. In August, 1991 Umbehr paid the overdue user fees for the period from June, 1990 to May, 1991.

The present action was filed in the U.S. District Court for the District of Kansas on May 15, 1991, alleging that the decision to terminate Umbehr's monopoly trash hauling contract on January 28, 1991 was a violation of his First Amendment rights. Umbehr sued the three County Commissioners who held office in 1990 when the original decision was made to terminate his contract, even though only two of them had voted for termination.

A summary judgment motion was filed on behalf of all defendants on December 16, 1991. Summary judgment was granted on December 30, 1993. The District Court held that all claims against the defendants in their official capacities were barred because independent contractors are not entitled to the same protection as employees under the First Amendment. The claims against all defendants in their individual capacities were also found to be barred by the application of qualified immunity. The claims against defendant McClure were found to be additionally barred because he had never voted to terminate the contract.

On review the Tenth Circuit Court of Appeals affirmed the decision with respect to all three defendants in their individual capacities, but reversed with respect to the official capacity claims. The Tenth Circuit disagreed with the reasoning of other circuits which had already ruled on the same

issue, concluding that independent contractors are entitled to relief for the retaliatory termination of at-will contractual relationships, so long as any potential economic benefit to the contractor is lost. In so holding the Tenth Circuit opinion expressly noted that its conclusion was "squarely in conflict with several other circuits, a posture we do not adopt lightly." The opinion further noted the view of the panel that the issue is one in which Supreme Court guidance is particularly needed. See 44 F.3d at p. 883.

ARGUMENT

THE MARKED DIFFERENCES OF OPINION AMONG THE CIRCUIT COURTS OF APPEAL CONCERNING A KEY CONSTITUTIONAL ISSUE NEVER PREVIOUSLY DECIDED BY THIS COURT REQUIRE REVIEW.

A substantial body of case law has developed to establish the rights of public employees to express themselves freely on matters of public concern. This Court has recognized the practical necessity of some limitation on the work-related speech of government employees, in order to assure the orderly operation of governmental functions. The relative rights and responsibilities of the government employer and government employee have been articulated in a series of cases spanning more than twenty-five years: See *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111

L.Ed.2d 52 (1990); *Waters v. Churchill*, 511 U.S. ___, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994); *United States v. National Treasury Employees Union*, ___ U.S. ___, 115 S.Ct. 1003, ___ L.Ed.2d ___ (1995).

This Court's numerous prior decisions concerning the rights of public employees have avoided more general conclusions about the rights of persons whose economic relationship to the government falls short of employee status. Although the Court has noted outside the context of First Amendment rights that an independent contractor may have substantially the same rights as an employee against intentional punishment for the exercise of constitutional rights, the most recent statement on this subject carefully declined to state a rule generally applicable both to employees and to all independent contractors. Compare *Lefkowitz v. Turley*, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973) with *Branti v. Finkel*, 445

U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). More recently this Court has more than once refused to review decisions of the Circuit Courts expressly rejecting any extension of First Amendment protection to the economic interests of independent contractors. See *LaFalce v. Houston, infra; Downtown Auto Parks, Inc. v. City of Milwaukee, infra; Sweeney v. Bond, infra; Lundblad v. Celeste, infra.*

The decision of the Tenth Circuit in this case is inconsistent with the conclusion reached by each of the other circuits which has expressly considered the degree to which independent contractors are entitled to a continuation of their economic relationship under a First Amendment analysis. There does not appear to be a majority view among the Circuits, but only fragmented and mutually inconsistent analysis and conclusions.

The Third and Seventh Circuits have expressly held that independent contractors

have no standing to object to termination of their services, even if a retaliatory motive is present. See *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983); *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 704 (7th Cir. 1991); *Horn v. Kean*, 796 F.2d 668 (3rd Cir. 1986).

Two decisions of the Eighth Circuit Court of Appeals reach inconsistent conclusions concerning the rights of independent contractors under the First Amendment: See *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982) concluding that only employees are protected and *Smith v. Cleburne County Hospital*, 870 F.2d 1375 (8th Cir. 1989), where a non-employee physician's hospital privileges were construed to be protected.

One Circuit Court of Appeals has avoided a direct determination of the status of independent contractors under current law, ruling only that qualified immunity applies

to the termination of an independent contractor in early 1983 because such rights were not then clearly established. See *Lundblad v. Celeste*, 874 F.2d 1097 (6th Cir. 1989), opinion on rehearing 924 F.2d 627 (1991).

The Fifth Circuit Court of Appeals has decided that independent contractors should have <u>greater</u>, not less, protection than direct employees. In the cases of *Copsey v. Swearingen*, 36 F.3d 1336 (5th Cir. 1994) and *Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir. 1995) that Court held that the termination of public licenses in retaliation against protected speech is actionable. *Copsey* and *Blackburn* refused to apply the balancing test of *Pickering* to economic relationships other than employer and employee, preferring instead to make all retaliatory terminations of license holders or contractors actionable without regard to the application of the *Pickering* balancing

test. The Fifth Circuit disagreed with the conclusions of the Sixth Circuit that qualified immunity should apply due to the absence of clearly established law. Compare *Blackburn, supra*, to *Lundblad v. Celeste, supra*.

The Ninth Circuit Court of Appeals has applied the *Pickering* test to situations where a "workplace grievance" is involved, even if the plaintiff is a licensee or contractor rather than a public employee. See *Havekost v. United States Department of Navy*, 925 F.2d 316 (9th Cir. 1991).

The Tenth Circuit, in the present case and in its earlier decision in *Abercrombie v. City of Catoosa, Oklahoma*, 896 F.2d 1228 (10th Cir. 1990), has determined that the grievances of independent contractors should be analyzed under *Pickering*, no matter what economic benefit may be at stake. The Tenth Circuit in the present case has sided with

the Sixth and against the Fifth on the issue of qualified immunity.

Application of the standard followed in the Third and Seventh Circuits would clearly result in a victory for the governmental defendant whenever a relationship falls short of an employment contract. The rule followed by the Sixth Circuit would result in victory only where qualified immunity would apply. The Ninth Circuit would restrict the *Pickering* analysis to workplace environments, no matter what the relationship between the parties. The Fifth Circuit would extend First Amendment protection to contracts and licenses wholly outside the workplace, but would deprive the government of the benefit of the *Pickering* balancing test where a workplace grievance is not involved. The Tenth Circuit would extend protection to all economic interests that may be adversely affected by an act of retaliation, even where

no direct economic benefit has ever flowed from the government agency to the contractor.

There is no obvious means by which to apply any of this Court's precedents to the present facts. It is unclear how the role of Mr. Umbehr, who in effect was the head of a government agency whose functions had been privatized, fits into the distinction between ordinary workers and policymakers under *Branti*, for example. There is no "workplace" where the contractor's actions can be disruptive, as contemplated by *Pickering*. Clearly a common sense analysis would support the conclusion that Umbehr's termination was a legitimate nonretaliatory administrative act. Yet it is not clear how common sense is to be applied to these facts under the test of *Waters v. Churchill*, for example. If the rule followed in the Fifth Circuit were applied to these facts, the result would be a clear victory for special interests and spoil seekers, contrary to the intent of

Rutan, which would deny the right to control government service positions even to the victors at the polls, let alone the losers.

This wide spectrum of application and interpretation of the rule of *Pickering* creates an intolerable situation for government administrators, who are daily confronted with the need to make decisions concerning the granting, termination, or renewal of licenses, franchise rights, and public contracts. Their ability to act in the best interest of the public is severely hampered by the risk of litigation by those who publicly and forcefully demand a share of the public treasury. Unless and until the law is clarified every prudent public administrator will be tempted to grant special economic privileges to critics of local policy, solely to avoid the risk of retaliatory civil suits. This Court must announce a rule of law which protects the ability of local government to serve the

ability of local government to serve the needs of the people rather than being held hostage by vocal special interests. At a minimum this Court should reaffirm the right of government administrators to follow a rule of evenhanded treatment for all and objective fairness of result, rather than being subjected to special scrutiny of their personal motives every time the pocketbook of a personal critic is affected.

Respectfully submitted,

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APPENDIX

Keen A. UMBEHR, Plaintiff-Appellant,

v.

Joe McCLURE, Glen Heiser, and George Spencer, Defendants-Appellees.

No. 94-3022.

United States Court of Appeals,
Tenth Circuit.

Jan. 4, 1995.

Rehearing Denied Feb. 10, 1995.

Before ANDERSON and TACHA, Circuit Judges, and CAMPOS,* District Judge.

STEPHEN H. ANDERSON, Circuit Judge.

Plaintiff and appellant Keen A. Umbehr appeals the district court's grant of summary judgment to Defendants, members or ex-members of the Wabaunsee County Commission, on his 42 U.S.C. § 1983 action alleging that Defendants

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*The Honorable Santiago E. Campos, Senior District Judge, United States District Court for the District of New Mexico, sitting by designation.

terminated a trash hauling contract in retaliation for Mr. Umbehr's exercise of his right to free speech. For the following reasons, we REVERSE and REMAND.

BACKGROUND

Mr. Umbehr operated a trash hauling business in Wabaunsee County, Kansas. By statute, the county was obligated to provide a plan for solid waste disposal. In 1981, the county entered into a contract with Mr. Umbehr. The contract was renegotiated in 1985. The 1985 contract is the one at issue in this case. Under the contract, Mr.Umbehr did not in fact haul trash for the county. Rather, the contract provided that Mr. Umbehr could haul trash for cities in the county, at a rate specified in the contract, provided each city endorsed and ratified the contract. No city was under any obligation to ratify the contract. Each city had the right to opt out of the contract on ninety days' notice. The contract itself was automatically renewed

for successive one-year terms, unless either party gave sixty days' notice of termination or ninety days' notice of intent to renegotiate. The contract further provided that, during its term, the county and each city which approved the contract agreed not to contract with "any other individual or firm to provide solid waste removal from residential premises in any [c]ity." Appellees' App. at 139.

Mr. Umbehr hauled trash for six of the seven cities in the county from 1985 until the county terminated the contract in 1991. In other words, the contract was automatically renewed each year, according to its terms. Throughout this time period, Mr. Umbehr spoke out at county commission meetings and wrote letters and columns in local newspapers about a variety of topics, including landfill user rates, the cost of obtaining county documents from the county, alleged violations by the county commission

of the Kansas Open Meetings Act, and a number of alleged improprieties, including mismanagement of taxpayer money, by the county road and bridge department.

Defendants Joe McClure, Glen Heiser, and George Spencer were all members of the Wabaunsee County Commission in 1990, when the commission voted to terminate the contract with Mr. Umbehr. Mr. Spencer and Mr. Heiser voted for termination, whereas Mr. McClure voted against termination. In fact, the attempted termination was not valid, and the contract continued for another year, until it was validly terminated in January 1991. At the time the contract was terminated, Mr. McClure was no longer on the county commission. His replacement on the commission voted not to terminate the contract, whereas Mr. Spencer and Mr. Heiser again voted in favor of termination. Mr. Umbehr subsequently entered into separate contracts to haul trash with five of the six cities he

had previously served. The county did not enter into any other contracts involving trash hauling.

Mr. Umbehr brought suit against Defendants, claiming that they caused the termination of his contract with the county in retaliation for his outspoken criticism of the county and the county commission, thereby violating his First Amendment right of free speech. He sued Defendants Heiser and Spencer in both their official and individual capacities. He sued Defendant McClure only in his individual capacity. Defendants filed motions for summary judgment. The district court assumed, solely for the purpose of its decision, that Mr. Umbehr "would have been protected from termination in retaliation for his statements" had he been a government employee, that his "comments did motivate the votes in favor of terminating [Mr. Umbehr's] contract with Wabaunsee County," and that he suffered damages as a result of the

termination. *Umbehr v. McClure*, 840 F.Supp. 837, 839 (D.Kan.1993). It then granted Defendants' motion for summary judgment on the ground that "the First Amendment does not prohibit defendants from considering plaintiff's expression as a factor in deciding not to continue with the trash hauling contract at the end of the contract's annual term." *Id.* The court expressly declined to rule on Defendants' claim that their actions were protected by legislative immunity, but held, alternatively, that Defendants were entitled to qualified immunity from damages for their actions. Finally, the district court held that Mr. McClure was additionally entitled to summary judgment because there was "insufficient evidence which proves that defendant McClure caused the termination of the contract." *Id.* at 841.

DISCUSSION

Summary judgment is appropriately granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). "We review a district court's summary judgment determination de novo, viewing the record in the light most favorable to the nonmoving party." *Artes-Roy v. City of Aspen*, 31 F.3d 958, 961 (10th Cir.1994).

[1] Although neither party has raised this issue, we first determine whether Mr. Umbehr has standing to bring this case. Standing is a threshold issue, "jurisdictional in nature." *Doyle v. Oklahoma Bar Ass'n*, 998 F.2d 1559, 1566 (10th Cir.1993). "For standing to exist, the plaintiff must 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82

L.Ed.2d 556 (1984)). The alleged injury "must be 'distinct and palpable,' *Warth v. Seldin*, 422 U.S. 490, 501 [95 S.Ct. 2197, 2206, 45 L.Ed.2d 343] (1975), as opposed to abstract, conjectural, or merely hypothetical." *Id.* (parallel citations omitted).

[2] We conclude that Mr. Umbehr has standing. Mr. Umbehr asserts a violation of his First Amendment rights--punishment, in the form of termination of a contract beneficial to him, because of his speech. While Defendants assert that the contract provided no benefit to the county, from which one could infer that its termination could inflict no injury on the county, Mr. Umbehr has alleged a benefit to him from the contract.[1] The contract obviated the need

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[1]Mr. Umbehr does not claim, nor need he, that he has a property interest in his contract. "[T]he Supreme Court has held a property right is not required for a first

(Cont'd)

for him to individually negotiate a trash hauling contract with each city; it gave him the exclusive right to haul trash for cities that ratified the agreement; and it gave him, for at least sixty days, the right to haul trash for cities pursuant to the agreement, inasmuch as the county could only terminate the contract on sixty days' notice.[2]

(Cont'd)

amendment retaliation claim." *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1233 (10th Cir.1990) (citing *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972)). In *Perry*, the Court made the following widely quoted statement:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech.

Perry, 408 U.S. at 597, 92 S.Ct. at 2697.

[2]Cities bound by the contract could only opt out on ninety days' notice.

Cf. Federal Deposit Ins. Corp. v. Henderson, 940 F.2d 465, 476 (9th Cir.1991) (holding that private contract providing for immediate termination for cause or at will termination on ninety days' notice "gave rise to a 'legitimate claim of entitlement' to ninety days of continued employment"). Further, he claims monetary injury from the termination of the contract, and there is no dispute that any such injury is "'fairly traceable'" to Defendants' actions in terminating the contract. *Doyle*, 998 F.2d at 1566 (quoting *Allen*, 468 U.S. at 751, 104 S.Ct. at 3324). He has clearly alleged an injury caused by Defendants. Accordingly, Mr. Umbehr has standing. We turn now to the merits of his claim that his First Amendment rights have been violated.

Mr. Umbehr was indisputably an independent contractor. As the district court acknowledged, there is conflicting case law on whether those who independently contract

with the government share the same degree of First Amendment protection for their speech as government employees.[3] A number of courts have held that governments may award or terminate public contracts on the basis of political affiliation or support. See *Triad Assocs., Inc. v. Chicago Hous. Auth.*, 892 F.2d 583 (7th Cir.1989) (holding that

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[3]A public employee speaking on a matter of "public concern" is protected from an adverse employment decision if "the interests of the [employee], as a citizen, in commenting upon matters of public concern [outweigh] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968), and if the employee proves that the protected speech was a "motivating factor" in the adverse employment decision. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); *see also Bisbee v. Bey*, 39 F.3d 1096, 1100 (10th Cir.1994). Speech on matters of public concern has been defined generally as speech "relating to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). For example, speech disclosing governmental wrongdoing or misconduct is generally of public concern.
(Cont'd)

independent contractor claiming loss of and denial of contracts because of political affiliation was not protected by First Amendment), *cert. denied*, 498 U.S. 845, 111 S.Ct. 129, 112 L.Ed.2d 97 (1990); *LaFalce v. Houston*, 712 F.2d 292 (7th Cir.1983) (holding that independent contractor claiming denial of public contract because of political affiliation was not protected by First Amendment), *cert. denied*, 464 U.S. 1044, 104 S.Ct. 712, 79 L.Ed.2d 175 (1984); *Horn v. Kean*, 796 F.2d 668 (3d Cir.1986) (en banc) (holding that independent contractors whose contracts were terminated following a change in administration were not protected by the First Amendment); *Sweeney v. Bond*, 669 F.2d 542, 545 (8th Cir.) (holding that fee agents who were not employees but were "'more in the nature of independent contractors'" who were

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(Cont'd)

See, e.g., Walter v. Morton, 33 F.3d 1240, 1243 (10th Cir.1994); *Wulf v. City of Wichita*, 883 F.2d 842, 857 (10th Cir.1989).

dismissed following a change in administration were not protected by the First Amendment), *cert. denied*, 459 U.S. 878, 103 S.Ct. 174, 74 L.Ed.2d 143 (1982); *Ambrose v. Knotts*, 865 F.Supp. 342, 345 (S.D.W.Va. Oct. 17, 1994) (holding that independent contractor claiming termination of contract in retaliation for petition was not protected by First Amendment); *O'Hare Truck Serv., Inc. v. City of Northlake*, 843 F.Supp. 1231, 1234 (N.D.Ill.1994) (holding that independent contractor claiming removal from city towing rotation list because of political affiliation was not protected by First Amendment); *Inner City Leasing and Trucking Co. v. City of Gary*, 759 F.Supp. 461, 464 (N.D.Ind.1990) (holding that independent contractor claiming termination of contract because of political affiliation not protected by First Amendment); *MEDCARE HMO v. Bradley*, 788 F.Supp. 1460, 1464-66 (N.D.Ill.1992) (holding that independent

contractor claiming termination of contract because of lobbying and other political activities not protected by First Amendment); *see also Lundblad v. Celeste*, 874 F.2d 1097, 1102 (6th Cir.), *vacated*, 882 F.2d 207 (6th Cir.1989), reinstated in pertinent part, 924 F.2d 627 (6th Cir.1991) (en banc) (holding that it was not clearly established that independent contractor claiming denial of public contract because of political affiliation was protected under First Amendment), *cert. denied*, 501 U.S. 1250, 111 S.Ct. 2889, 115 L.Ed.2d 1054 (1991). But *see Horn*, 796 F.2d at 680-85 (Gibbons, Sloviter, Mansmannt, Stapleton, JJ., dissenting) (rejecting view that independent contractors can be treated differently than employees for First Amendment purposes).

Our own circuit has suggested, without analysis, that independent contractors do enjoy protection against retaliation for the exercise of First Amendment rights.

Abercrombie, 896 F.2d at 1233. In *Abercrombie*, the Plaintiff was the owner of a wrecker business who received referrals from the City of Catoosa police chief. The Plaintiff had received all wrecker referrals from the police for a period of time, but after testifying in court as a witness in a suit against the city, he no longer received all wrecker referrals; instead he shared them with another wrecker company. After campaigning on behalf of a mayoral candidate running against the incumbent mayor, the Plaintiff was removed entirely from the police department's wrecker rotation log. He brought a section 1983 action against the city, the police chief, and the mayor, claiming, inter alia, that he had been deprived of a property interest without due process and that Defendants had retaliated against him for the exercise of his First Amendment rights.

After concluding that the Plaintiff had a property interest in wrecker referrals pursuant to applicable state statutes, we also concluded that the district court erred in granting judgment notwithstanding the verdict on his First Amendment retaliation claim. We gave little reasoning, however, simply stating:

> The district court dismissed the entire Section 1983 claim because it found that plaintiff did not have a property right in continued wrecker referrals. But, as noted above, plaintiff did have a property right in equal referrals. Furthermore, the Supreme Court has held a property right is not required for a first amendment retaliation claim.

Id. at 1233 (citing *Perry*, 408 U.S. 593, 92 S.Ct. 2694). Thus, we simply assumed that an independent contractor could assert a First Amendment retaliation claim.

Other circuits have provided a more detailed analysis of the issue, in reaching the opposite conclusion. The Seventh Circuit in *LaFalce* and the Third Circuit in *Horn*

provided the clearest explanation of the reasoning behind those decisions holding that independent contractors enjoy no First Amendment protection when their contracts are terminated or they do not receive government contracts because of their exercise of First Amendment rights.[4] Two broad rationales animated those decisions: (1) the history and legal treatment of patronage practices in government employment; and (2) perceived distinctions between the economic status and interests of independent contractors and employees. We examine each in turn.

As the Horn majority observed, the practice of political patronage is a "centuries' old" and "historically established and traditionally accepted characteristic[ ] of government, be it on a municipal, county, state, or federal level." *Horn*, 796 F.2d at

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[4]Virtually all of the other cases cited above specifically followed the *Horn* and *LaFalce* decisions.

672, 673; *see also LaFalce*, 712 F.2d at 294 ("Patronage in one form or another has long been a vital force in American politics."). At the time *Horn* and *LaFalce* were decided, only two Supreme Court cases had addressed the propriety of that long-established practice. In *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), a divided Supreme Court held that a government employer could not discharge a nonpolicymaking, nonconfidential employee solely because of the employee's political beliefs or affiliation. *Id.* at 375, 96 S.Ct. at 2690 (Stewart, J., concurring). A clear majority in *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), reaffirmed that principle, but specifically stated that both *Elrod* and *Branti* dealt only with "the dismissal of public employees for partisan reasons." *Branti*, 445 U.S. at 513 n. 7, 100 S.Ct. at 1292 n. 7. The Court noted that among the many practices falling

within the broad definition of a patronage system was "granting supporters lucrative government contracts" but stated that neither Elrod nor Branti involved such practices.

Thus, as the *Horn* majority stated, "We perceive neither authority nor inkling in these decisions to extend first amendment protection beyond stated circumscriptions." *Horn*, 796 F.2d at 674; *see also LaFalce*, 712 F.2d at 294-95 ("We are particularly reluctant to take so big a step in the face of the Supreme Court's apparent desire to contain the principle of *Elrod* and *Branti*.").

As indicated, the *Horn* and *LaFalce* courts also relied upon presumed practical and economic differences between independent contractors and employees as a basis for finding no violation of contractors' First Amendment rights:

> [M]ost government contractors also have private customers. If the contractor does not get the particular government contract on which he bids, because he is on the outs with the incumbent and the

> state does not have laws requiring the award of the contract to the low bidder (or the laws are not enforced), it is not the end of the world for him; there are other government entities to bid to, and private ones as well. It is not like losing your job. Of course, the contrast can be overstated; unless the government worker who loses his job cannot find another job anywhere, the loss will not be a total catastrophe.... An independent contractor would tend we imagine to feel a somewhat lesser sense of dependency.

LaFalce, 712 F.2d at 294.[5] The Seventh Circuit further observed that "[m]any firms that have extensive government business are political hermaphrodites," and that extending *Elrod* and *Branti* First Amendment protection to independent contractors "would invite

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[5]*Horn* involved independent contractors (motor vehicle agents) most of whom in fact were minimally dependent on their contractual arrangements with the government. The court was therefore able to avoid what it called "the emotionally-charged scenario posed at oral argument: Whether the first amendment would protect from politically-motivated discharge an independent contractor with substantial economic dependence on the state, e.g., a one-person shoeshine stand in a public building." *Horn*, 796 F.2d at 675 n. 9.

every disappointed bidder for a public contract to bring a federal suit against the government purchaser." *Id.*; *see also Horn*, 796 F.2d at 675.

Thus, of the two broad rationales behind *Horn* and *LaFalce*--that the Supreme Court has restricted patronage practices sparingly and only in connection with employees, and that independent contractors have a different economic status vis-a-vis the government than do employees--the first one arguably supports the decisions permitting the award or termination of public contracts on the basis of political affiliation. The question remains whether it supports the termination of government contracts in retaliation for speech on matters of public concern, particularly in light of the Supreme Court's most recent case involving patronage practices, *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990).

In *Rutan*, the Court extended *Elrod* and *Branti* to hold that "promotions, transfers, and recalls after layoffs based on political affiliation or support" impermissibly infringe the First Amendment rights of public employees. *Rutan*, 497 U.S. at 75, 110 S.Ct. at 2737. The *Rutan* Court's reasoning undermines part of the Seventh and Third Circuits' rationales in their independent contractor cases. The Court dismissed the argument that expanding the protections of *Elrod* and *Branti* would lead to "excessive interference [in state employment] by the Federal Judiciary." *Id.* at 75 n. 8, 110 S.Ct. at 2738 n. 8.

The Court further explained that governmental interests in efficiency and effectiveness can still be preserved by "discharging, demoting, or transferring staff members whose work is deficient" and by permitting the selection or dismissal of "certain high-level employees on the basis of

their political views." *Id.* at 74, 110 S.Ct. at 2737. The Court stated the overriding principle as follows: "The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate." *Id.* at 76, 110 S.Ct. at 2738. It therefore "precludes the government from accomplishing indirectly" that which it cannot command directly. *Id.* at 77-78, 110 S.Ct. at 2738-39 (citing *Perry*, 408 U.S. at 597, 92 S.Ct. at 2697). Arguably, in permitting governments to terminate a public contract because of the contractor's speech, courts have permitted governments to accomplish indirectly that which they cannot accomplish directly--punishment of speech that they do not like. Indeed, it is indisputable that in its role as sovereign, the government cannot punish or otherwise burden the speech of

citizens criticizing the government, except in very limited circumstances. Under current Supreme Court jurisprudence, the government, in its role as employer, can only punish or burden speech of its employees criticizing the government when it shows that such speech interferes with the government's ability to function. In permitting just that kind of punishment or burdening of speech by independent contractors, courts accord those who contract with the government a lesser degree of First Amendment protection than ordinary citizens enjoy vis-á-vis their government or than government employees enjoy vis-a-vis their employer.

Nonetheless, the Seventh Circuit has adhered to its *LaFalce* and *Triad Associates* precedents, even after *Rutan*. In *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. denied*, 502 U.S. 1005, 112 S.Ct. 640, 116 L.Ed.2d 657 (1991), the court held that a city did not violate

the First Amendment when it terminated a lease with an independent contractor who had lobbied against it. The court stated: "We continue to concur in the view taken by the other circuits, and hold that political favoritism in the awarding of public contracts is not actionable." *Id.* at 710. The court held to this view despite acknowledging that, while *Rutan* directly addressed only government employees, its "scope ... and [the] rationale behind it, seem to be at odds with the holding of *LaFalce* and *Triad*." *Id.* at 709. In our view, *Rutan* has indeed undermined the rationale for *Horn* and *LaFalce* that relied upon the Supreme Court's reluctance to extend *Elrod* and *Branti*.

The other rationale behind *LaFalce* and *Horn* was premised on differences between public employees and independent contractors. Some of these differences are open to question, while others are undeniably true. Whether or

not these are relevant distinctions, for example, independent contractors generally have more discretion and control over the performance of their jobs than do employees, and in that respect some may be more like the high-level policymaking employees who are still subject to patronage dismissals under *Rutan*, *Elrod*, and *Branti*. See *Vickery v. Jones*, 856 F.Supp. 1313, 1325 (S.D.Ill.1994) ("Thus, like high-level employees, independent contractors do not have supervisors and can be hired or dismissed on the basis of political affiliation to ensure that their work is done in accordance with the party's philosophies."). Still others function in a way very similar to employees. *See Smith v. Cleburne County Hosp.*, 870 F.2d 1375, 1381 (8th Cir.) (applying *Pickering* balancing test to denial of medical staff privileges when "there is an association between the independent contractor doctor and the Hospital that have similarities to that

of an employer-employee relationship"), *cert. denied*, 493 U.S. 847, 110 S.Ct. 142, 107 L.Ed.2d 100 (1989).

On the other hand, much of the *LaFalce* and *Horn* rationale for treating independent contractors differently from employees rests on the assumption that independent contractors have less at stake than an employee, and the loss of a contract is less devastating than the loss of a job. While that is undeniably true in some cases, as it was in *Horn*, we have seen no empirical data that it is always or even usually the case. *See Horn*, 796 F.2d at 681 n. 1 (Gibbons, C.J., dissenting) ("There is no empirical evidence that independent contractors, especially those involved in providing personal services, are as a group less dependent on the government for work than are public servants."). And with the increasing "privatization" of government, more and more of the government's work is accomplished

through independent contractors, thereby increasing both the number and variety of such contractual arrangements.

We of course recognize that there is a long and vital tradition of treating independent contractors differently from employees in many legal contexts. In this First Amendment context, we reject any categorical distinctions based on whether independent contractors have more or less of an economic interest in their governmental contracts, both because such categorical distinctions are impossible to make and because, in this context, they are irrelevant. There is little justification for a rule that the magnitude of the loss determines whether an individual's First Amendment rights have been violated. As the dissenting opinion in *Horn* pointed out, "The constitutional wrong condemned in *Elrod* and *Branti* was the state's attempt to control the beliefs and associations of its citizens. That control

can be just as effective and offensive when the state reduces a citizen's income by twenty percent as when the state reduces the citizen's income by one hundred percent." *Id.* at 683 (Gibbons, C.J., dissenting) (citations omitted). And *Rutan*'s extension of protection against patronage practices to a variety of employment practices short of dismissal undermines the argument that only the complete loss of one's job merits First Amendment protection.

[3-5] In sum, of the two rationales behind decisions such as *LaFalce* and *Horn*, which deny independent contractors the First Amendment protections enjoyed by public employees, the first rationale--the Supreme Court's cautious restriction of patronage practices in government employment--has been undermined by *Rutan* and has limited relevance to whether independent contractors should be protected against retaliation for speech on matters of public concern. The second

rationale--presumed differences between the status of independent contractors and employees--is of questionable empirical validity and of dubious relevance to the question of whether First Amendment rights have been violated. Neither one explains why independent contractors should be given less First Amendment protection than either ordinary citizens or government employees. We therefore specifically hold, as we assumed in *Abercrombie*, that an independent contractor is protected under the First Amendment from retaliatory governmental action, just as an employee would be. Thus, the *Pickering* balancing test would apply to such a retaliatory action.[6] We realize that this decision places us squarely in conflict with several other circuits, a posture we do not adopt lightly. We also agree with the

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[6]We recognize that, in Mr. Umbehr's case, damages may be small and difficult to prove.

Seventh and Third Circuits that this is an area in which Supreme Court guidance is particularly needed.

[6] The district court also held Defendants qualifiedly immune under *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), because their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." We agree that Defendants should be qualifiedly immune from Mr. Umbehr's claim for damages against them in their individual capacities, given the uncertainty in this area of law. We also affirm the district court's conclusion that there is insufficient evidence proving that Defendant McClure, who was no longer on the county commission when Mr. Umbehr's contract was not renewed, and who in any event had voted earlier not to terminate the contract, caused Mr. Umbehr's

injury. We therefore agree that summary judgment was properly granted to him.

[7] Furthermore, Defendants have raised the issue of absolute legislative immunity, which the district court observed was a "close question." Mr. Umbehr sued Defendants Heiser and Spencer in both their official and individual capacities. In their individual capacities, we have held that they are entitled to qualified immunity. An official capacity suit is just "another way of pleading an action against an entity of which an officer is not an agent." *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 2036 n. 55, 56 L.Ed.2d 611 (1978). As the Supreme Court has stated, "[t]he only immunities that can be claimed in an official capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." *Kentucky v. Graham*, 473 U.S.

159, 167, 105 S.Ct. 3099, 3106, 87 L.Ed.2d 114 (1985).

Accordingly, we REVERSE and REMAND this case for further proceedings consistent herewith. All pending motions are DENIED.